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9 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 BRANDI PASSANTE,

11 Plaintiff,

Case No.: SACV12-01866JVS (ANx)

12 vs.

**PLAINTIFF'S NOTICE AND MOTION
FOR DEFAULT JUDGEMENT;
DECLARATIONS AND EXHIBITS IN
SUPPORT**

13 HUNTER MOORE and JOHN DOES 1-25,

14 Defendants.
15

16 COMES NOW, Plaintiff Brandi Passante ("Passante" or "Plaintiff") and hereby moves
17 this Court for Default Judgment against Defendant, Hunter Moore ("Moore" or "Defendant") for
18 all claims alleged in the original complaint, including: Lanham Act 15 USC 1125(a): False
19 Designation of Origin; Lanham Act 15 USC 1125(c): Dilution by Tarnishment; Right to
20 Privacy/Right to Control Publicity and Likeness (Common Law Claim for Commercial
21 Misappropriation); Defamation *per se*; Invasion of Privacy; Commercial Disparagement; and
22 Consumer Fraud. Further, Plaintiff seeks entry of a permanent injunction prohibiting Defendant
23 from further infringement of Plaintiffs' rights.
24

1 Plaintiff, hereby, seeks judgment and damages under 15 USC §§ 1125 (a), (c) and 1117
2 in the total amount of \$1,250,000 in actual damages and \$1,250,000 in exemplary damages;
3 \$5,250 statutory damages under Cal. Civ. Code § 3344; and attorney's fees and costs in an
4 amount to be proven up pursuant to application filed with the Court, in addition to any additional
5 relief this Court deems fair and just.

6 By this Notice of Motion and Motion for Default Judgment, the Memorandum of Points
7 and Authorities attached thereto, and the Declaration of Linda S. McAleer and exhibits attached,
8 Plaintiffs request that a default judgment be entered based on the following points:

- 9 1. Defendant is not an infant or incompetent or in the military service or otherwise
10 exempted under and Federal or state law.
- 11 2. Defendant has failed to appear in this action.
- 12 3. This Notice and Motion for Default Judgment, and all supporting documents, with
13 true and correct copies, is being served on Defendant on May 7, 2013, by placing true
14 and correct copies thereof in sealed envelopes addressed to Defendant where he has
15 previously been served, and via email.
- 16 4. Plaintiff elects damages under 15 USC §§ 1125 (a), (c) and 1117 in the total amount
17 of \$1,250,000 in actual damages and \$1,250,000 in exemplary damages; \$5,250
18 statutory damages under Cal. Civ. Code § 3344; and attorney's fees and costs in an
19 amount to be proven up pursuant to application filed with the Court.
- 20 5. Plaintiff is entitled to default judgment based on violation of all causes of action
21 alleged in the original complaint dated October 26, 2012.
- 22 6. This Motion is based on this Notice of Motion, Motion for Entry of Default Judgment
23 and accompanying Memorandum of Points and Authorities, the Declarations and
24

1 exhibits attached thereto, the pleadings, records and papers on file, and such other
2 matters and evidence that may be presented.
3

4 Respectfully Submitted,

5 Dated: May 7, 2013
6

A handwritten signature in dark ink, appearing to read "L. McAleer", written over a horizontal line.

Linda S. McAleer
Attorney for Plaintiff

TABLE OF AUTHORITIES

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND STATEMENT OF FACTS**

3 Defendant, Hunter Moore (“Defendant” or “Moore”), was involved in actively defying
 4 the Lanham Act and other individual publicity rights against Plaintiff Brandi Passante
 5 (“Plaintiff” or “Passante”). Defendant posted the images attached hereto as Exhibit 1 of a female
 6 whom he falsely represented as “brandie from storage wars fingering herself for me” [sic].
 7 Defendant traded on Ms. Passante’s celebrity status by willfully offering to disseminate the video
 8 and photos to third parties and disseminating defamatory content to those that requested the
 9 same. Defendant posted the video knowing the images were not of Passante and did so with
 10 malice and reckless disregard to Ms. Passante’s reputation, privacy, and well-being. This activity
 11 was done with the false and fraudulent intent to mislead the public into believing he was, in some
 12 way, affiliated with Ms. Passante. Defendant has publicly admitted defying the Lanham Act and
 13 other individual publicity rights, stating “I’m not a virgin to cease and desists – I get about a
 14 million a day...I don’t give a fuck. I’m never going to stop.”

15 Moreover, in flagrant disregard for the procedures of this Court, the Defendant has not
 16 properly appeared in response to valid and effective service of process upon him. Defendant’s
 17 defaults have deprived Ms. Passante of the ability to prove a specific amount of actual damages.
 18 Accordingly, Plaintiff relies on statutory damage provisions, requesting an amount within the
 19 “willful” range, having met the basis for the heightened measure of statutory damages for the
 20 Defendant’s willful infringements.

21 Plaintiff seeks judgment and damages under 15 USC §§ 1125 (a), (c) and 1117 in the
 22 total amount of \$1,250,000 in actual damages and \$1,250,000 in exemplary damages; \$5,250
 23 statutory damages under Cal. Civ. Code § 3344; and attorney’s fees and costs in an amount to be
 24 proven up pursuant to application filed with the Court. Further, Plaintiff seeks entry of a

1 permanent injunction prohibiting Defendant and his representatives from further infringing
2 Plaintiff's rights.

3 **A. Plaintiff Brandi Passante**

4 Ms. Passante is a regular on the A&E Network's show, *Storage Wars* and has achieved
5 notoriety and worldwide celebrity status as a result. *Complaint (Compl.)* at ¶ 9. Her name and
6 likeness are used frequently in the promotion of the show through merchandise that is available
7 through A&E's distribution channels. *Id.* at ¶ 10. On or around, October 14, 2012, Ms. Passante
8 was inundated with unsolicited posts on her Twitter account stating "Can't wait to see the video"
9 and "Love the pics" among other references to the video and pictures disseminated by the
10 Defendant. *Id.* at ¶ 11. Ms. Passante has commercial interests in her identity and maintains an
11 interest in protecting those interests. *Id.*

12 **B. Defendant's Infringing Activities**

13 On or around October 14, 2012, Defendant posted images attached hereto as Exhibit 1 of
14 a female whom he falsely represented is "brandie from storage wars fingering herself for me"
15 [sic]. *Compl.* at ¶ 16. Defendant traded on Ms. Passante's celebrity status by willfully offering to
16 disseminate the videos and photos to third parties and disseminating defamatory content to those
17 that requested the same. *Id.* at ¶ 17. On or around October 16, 2012 Defendant posted a video at
18 fleshbot.com, a site known for pornography and other such filth. *Id.* at ¶ 18. Further, the video on
19 said site infected users with a virus upon downloading. *Id.* at ¶ 19

20 Defendant profits from the activities on the website by accepting bookings for
21 appearances and selling "Hunter Moore" merchandise associate with his website. *Id.* at ¶¶ 20-22.
22 Defendant posted the video knowing the images were not of Passante and did so with malice and
23 reckless disregard to Ms. Passante's reputation, privacy, and well-being. *Id.* at ¶ 24. This activity
24 was done with the false and fraudulent intent to mislead the public in believing he was, in some

1 way, affiliated with Ms. Passante. *Id.* at ¶ 24. The same or similar posting has been disseminated
2 to multiple sites by the Defendant. *Id.* at ¶14.

3 The Defendant's willful action has caused Ms. Passante to suffer anxiety, loss of sleep,
4 and physical illness as a direct and proximate result as well as incalculable damage to her
5 personal and professional reputation. *See Id.* at ¶¶ 14, 31, 44, 51, 55, 59, 66, and 71.

6 **C. This Action**

7 Plaintiff filed this action on or about October 26, 2012. Plaintiff's complaint alleges
8 violations of Lanham Act 15 USC 1125(a); False Designation of Origin; Lanham Act 15 USC
9 1125(c): Dilution by Tarnishment; Right to Privacy/Right to Control Publicity and Likeness
10 (Common Law Claim for Commercial Misappropriation); Defamation *per se*; Invasion of
11 Privacy; Commercial Disparagement; and Consumer Fraud. Plaintiff further requests a
12 permanent injunction for all activities associated with her name and likeness through any media
13 by the Defendant.

14 Plaintiff served Defendant in person according to the rules of California in Philadelphia
15 Pennsylvania on November 2nd 2012 at 11:20 pm. Docket No. 10. Service of all subsequent
16 documents has been accomplished by email addressed to Defendant's known email addresses
17 with this Court's permission and a hard copy sent via United State Postal Service mail to
18 Defendant's known physical address. Defendant's answer was due on November 23, 2012. No
19 answer has been filed with the court to date.

20 A temporary restraining order requiring Defendant to remove the illicit content from any
21 and all websites under his control was issued on October 26, 2012. A Show Cause Hearing
22 regarding Preliminary Injunction was held and concluded on November 16, 2012, and an order
23 granting the preliminary injunction was entered on November 20, 2012 as Docket No. 17. When
24 Defendant failed to comply with the Preliminary Injunction, Plaintiff filed an Application for an

Order to Show Cause regarding Civil Contempt. Defendant was found in Contempt pursuant to an Order entered on January 9, 2013 as Docket No. 25. Entry of Default was filed as Docket No. 32 on February 14, 2013.

II. ARGUMENT

A. Default Judgment is Properly Entered Against Defendant

Plaintiff is entitled to a Default Judgment pursuant to FRCP 55, “[w]here a party fails to plead or otherwise defend against a complaint, after entry of default, default judgment may be entered against him.” , 2003 WL 22429482, at *5 (C.D. Cal. July 18, 2003); FRCP 55(a). In *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986), the Ninth Circuit outlined the following factors to determine whether to grant default judgment: 1) the substantive merits of the plaintiff’s complaint; 2) the complaint’s sufficiency; 3) the amount of money at stake; 4) the possibility of prejudice to the plaintiff if relief is denied; 5) the possibility of dispute as to any material facts; 6) whether default resulted from excusable neglect; and 7) the policy of the Federal Rules favoring decisions on the merits. *Id.* at 1470-72. Each of the aforementioned elements weighs in favor of granting Plaintiff’s Motion for Default Judgment.

1. Plaintiff’s Complaint is Meritorious and Sufficiently Charges Defendant On All Claims Alleged

The first two *Eitel* factors involving the substantive merits and sufficiency of the complaint require that the Plaintiff’s allegations state a claim upon which relief may be granted. Fed. R. Civ. P. 8(a)(2); *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Upon a default by the Defendant, all factual allegations of the Plaintiff’s Complaint, other than those relating to an amount for damages, are deemed admitted. Fed. R. Civ. P. 8(b)(6); *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). Here, Plaintiff’s Complaint pleads facts

1 sufficient, as a matter of law, to establish that Defendant is liable for each of the causes of action
 2 alleged.

3 **a. Violation of the Lanham Act 15 USC 1125 (a)**

4 Passante's claim for false designation of origin arises under Section 43(a) of the Lanham
 5 Act, 15 U.S.C. § 1125(a), which provides in part:

6 Any person who, on or in connection with any goods or services ... uses in
 7 commerce any word, term, name, ... or any false designation of origin,
 8 false or misleading description of fact, or false or misleading
 9 representation of fact, which

10 (A) is likely to cause confusion, or to cause mistake, or to deceive as to the
 11 affiliation, connection, or association of such person with another person,
 12 or as to the origin, sponsorship, or approval of his or her goods, services,
 13 or commercial activities by another person....

14 shall be liable in a civil action by any such person who believes that he or
 15 she is or is likely to be damaged by such act.

16 15 USC § 1125(a)

17 Moore used Passante's name and likeness in commerce in connection with two images
 18 and a salacious video. Moore falsely claimed the video originated with Passante and was created
 19 for him. Moore's statements were made with malice, are false, fraudulent and misleading,
 20 intended to deceive the public into believing that Passante participated in, condoned, and/or
 21 authorized the publication of the video and/or are in some way affiliated with Moore, thereby
 22 driving web traffic and increased notoriety to Moore's illicit website. The video disseminated by
 23 Moore not only contained images that disparage Passante, but also contained a virus that was
 24 released when viewers attempted to watch the video. Moore's actions falsely used Passante's
 name and likeness in violation for the Lanham Act 15 USC 1125 (a). As a direct and proximate
 result of Moore's actions, Passante has suffered emotional, physical and psychological damage,

1 including damage to her personal and professional reputation. Additionally, under 15 USC 1117

2 (a) Plaintiff is entitled to attorney's fees.

3 **b. Violation of the Lanham Act 15 USC 1125 (c)**

4 Passante, as a celebrity with a right to publicity, is entitled to injunctive relief under the
5 Lanham act if she can show another person who, at any time after her mark became famous,
6 commences use of a trade name in commerce that is likely to cause dilution by tarnishment of
7 the famous mark, regardless of the presence or absence of actual or likely confusion, of
8 competition, or of actual economic injury. 15 U.S.C. § 1125(c)

9 Passante is a famous celebrity and thusly has a protectable right to publicity. Passante
10 Decl. ¶2. Furthermore, her image is widely recognized in association with the *Storage Wars*
11 brand. Passante Decl. ¶3. Four years after Passante achieved fame on *Storage Wars*, and as a
12 direct consequence of her celebrity, Moore posted pornographic images and a pornographic
13 video, attributing them to Passante. Passante Decl. ¶6. The pornographic nature of the images
14 and associated video tarnish Passante's reputation, celebrity and brand by their very nature, as
15 they allege she has taken part in immoral, lascivious acts. Moore's use of Passante's name and
16 likeness caused actual confusion as evidenced by the posts and comments sent directly to
17 Passante via social media. Passante Decl. ¶6. Moore's use of Passante's name and likeness are
18 commercial use as they are intended to misdirect traffic to his many websites to further his
19 infamy and lead to sales of his merchandise and music, which can be purchased through links on
20 the websites where the images appear. As a result of Moore's tarnishment to her image in direct
21 violation of 15 USC 1125 (c), Plaintiff is entitled to equitable relief and a permanent injunction.

22 **c. Violation of California Civil Code § 3344**

23 Plaintiff elects to pursue her claim of Commercial Misappropriation of Likeness under
24 California Civil Code § 3344. A person may be liable for commercial misappropriation if he

1 “knowingly uses another’s name, voice, signature, photograph or likeness in any manner, on or
 2 in products, merchandise, or goods or for purposes of advertising or selling, or soliciting
 3 purchases of products, merchandise, goods or services, without such person’s prior consent.”
 4 CAL. CIV. CODE §3344(a). *Slivinsky v. Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 807, (1990);
 5 *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 895, (1974).

6 Defendant Moore knowingly used Plaintiff’s name and likeness when he falsely
 7 attributed pornographic video and associated images to Plaintiff. Not only did the video contain a
 8 female with a resemblance to Passante, but Defendant claimed the woman was in fact Passante
 9 by posting “brandie from storage wars fingering herself for me” [sic], in association with the
 10 images. Moore’s use of Passante’s name and likeness were commercial use as they were
 11 intended to, and did, misdirect traffic to his many websites to lead to sales of his merchandise
 12 and music, which can be purchased through links on the websites where the images appear.
 13 Passante had never heard of or met Defendant Moore, nor did she participate in the video or give
 14 consent to Moore for the use of her name or likeness. Moore’s actions are the direct and
 15 proximate cause of Passante’s damages.

16 **d. Defamation**

17 California Civ. Code § 45a sets forth the elements of defamation *per se*: “A libel which is
 18 defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement,
 19 innuendo or other extrinsic fact, is said to be a libel on its face.” When plaintiff can prove libel
 20 *per se*, damage to reputation is presumed, so that the plaintiff need not introduce evidence of
 21 actual damages to recover compensatory, or, in appropriate cases, punitive damages. *Barnes-*
 22 *Hind, Inc. v. Superior Court*, 181 Cal. App. 3d 377, 382. In all cases of alleged defamation,
 23 whether libel or slander, “the truth of the offensive statements or communication is a complete
 24 defense against civil liability, regardless of bad faith or malicious purpose.” *Smith v. Maldonado*,

1 72 Cal. App. 4th 637. The burden rests with the defendant to "justify" or show the truth of the
 2 statements. *Id.*

3 Moore intentionally posted the illicit still images and pornographic video stating as "fact"
 4 that they featured Passante knowing that the statements were false, and that Passante was not in
 5 fact the female appearing in the video and images. By publishing false and libelous statements
 6 associated with the images and video, Defendant has defamed Plaintiff in direct violation of
 7 California law. Moore's statements are false and do not constitute qualified communications that
 8 are privileged under California law. Due to the pornographic nature of the video it constitutes
 9 moral turpitude, and is *per se* defamatory. Moore's statements have a natural tendency to injure
 10 and cause special damage. Because Defendant has raised no defense and has not met his burden
 11 to establish the truth of his statements, and the images are not of Passante, Plaintiff has
 12 established defamation *per se*. As a direct and proximate result of Moore's actions, Passante has
 13 suffered damages and irreparable harm.

14 e. **Invasion of Privacy**

15 To prevail in a claim for Invasion of Privacy, Plaintiff must show a public statement that
 16 places Plaintiff in a false light in the public eye. Such statement must be an inaccurate depiction
 17 and offensive to a reasonable person. Due to her celebrity Plaintiff must show Defendant acted
 18 with reckless disregard of the falsity of his statements.

19 Here, Defendant very publicly falsely alleged that a pornographic video involved
 20 Plaintiff, thereby painting her in a false light. By posting a pornographic video and still images
 21 falsely attributed to Passante, Defendant intruded upon the most private area of one's life –
 22 sexual congress and behavior. The acts portrayed in the video, falsely represented to be Passante,
 23 are inherently of a private nature which Passante herself would not have created or shared
 24 publicly. Pornography by its very nature is highly offensive to a reasonable person. Defendant

1 knew the female in the video was not Ms. Passante when he posted the video and images and
2 claimed they in fact her. Defendant made the claim knowing it to be false, with blatant and
3 reckless disregard for the falsity of his statements. As a direct and proximate result of Moore's
4 actions, Passante has suffered incalculable damages and irreparable harm.

5 **f. Disparagement**

6 Disparagement occurs through the publication of a statement that disparaged the quality
7 of the plaintiff's product or image; the offending statement was couched as fact; the statement
8 was false and was made with malice; and the statement resulted in monetary loss., which causes
9 the plaintiff actual pecuniary damage. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App.
10 3d 543, 548; *Nichols v. Great American Insurance Companies*, 169 Cal. App. 3d 766, 773

11 By posting a pornographic video and images falsely attributed to Passante, Moore
12 intentionally disparaged of the quality of Passante's right to publicity. Moore's statements that
13 the woman in the video and images were of Plaintiff were presented as fact although Defendant
14 knew them to be false at the time he posted the comments and images. Moore knowingly and
15 with malice made the false allegation of fact that woman in the video was Plaintiff and persisted
16 in his claims even after being served cease and desist letters, a temporary restraining order, and a
17 preliminary injunction. Moore's malice did not cease until he was found in contempt by this
18 Court. Moore's actions have resulted in pecuniary loss to Passante, including but not limited to
19 legal fees. As a direct and proximate result of Moore's actions, Passante has suffered
20 incalculable damages and irreparable harm.

21 **g. Consumer Fraud**

22 To prevail in a claim for consumer fraud Plaintiff must show Defendant made a
23 misrepresentation of a material fact with knowledge of the falsity intended deceive the
24

1 consuming public and to induce reliance where such reliance is justifiably reasonable and such
2 fraud results in damages.

3 Moore misrepresented a material fact consisting of the false representation that the
4 female appearing in the images and video posted on his websites was in fact Plaintiff. Moore
5 knew that his claims were false. Moore's false statements were intended to deceive the public
6 into believing that Passante participated in, condoned, and/or authorized the publication of the
7 video or was in some way affiliated with Moore, thereby bringing web traffic and increased
8 notoriety to Moore's illicit web site. Followers of Moore justifiably relied on the
9 misrepresentation; the viewers accepted the representation as made and were led to believe that
10 they were seeing images of a well-known celebrity. Actual confusion and belief that Plaintiff
11 was the woman in the video resulted, and brought those seeking Ms. Passante to Mr. Moore's
12 websites. The false claims resulted in damage because of the spread of the computer virus which
13 downloaded when individuals lured to the website clicked on the play icon. As a direct and
14 proximate result of Moore's actions, Passante has suffered incalculable damages and irreparable
15 harm.

16 **2. All Other *Eitel* Factors Have Been Met**

17 **a. Amount at Stake:**

18 The third *Eitel* factor requires the Court to consider the amount of money at stake. *Eitel*,
19 782 F.2d at 1471-1472. In the Complaint, Plaintiff prays for injunctive relief and damages.
20 *Compl.* at ¶¶ 32, 38, 44, 49, 55, 59, 66, 71, and 74; Prayer. By this Motion, Plaintiff seeks a
21 permanent injunction against Defendant and judgment and damages under 15 USC §§ 1125 (a),
22 (c) and 1117 in the total amount of \$1,250,000 in actual damages and \$1,250,000 in exemplary
23 damages; \$5,250 statutory damages under Cal. Civ. Code § 3344; and attorney's fees and costs
24 in an amount to be proven up pursuant to application filed with the Court., and interest on the

1 judgment. Thus, this sum of money and injunctive relief is warranted in light of the Defendant's
2 willful and intentional conduct.

3 **b. Possibility of Prejudice**

4 The fourth *Eitel* factor considers whether the Plaintiff will suffer prejudice if default
5 judgment is not entered. *Eitel*, 782 F.2d at 1471-1472. Defendant chose to continue offering the
6 pornographic video of Plaintiff after receiving a cease and desist, defendant willfully refused to
7 remove the material, stating: "I'm not a virgin to cease and desists – I get about a million a
8 day...I don't give a fuck. I'm never going to stop." *Compl.* at ¶ 15. Moreover, the Court issued
9 an Order to Show Cause re: Civil Contempt on December 14, 2012 for his blatant refusal to
10 comply with the Court's preliminary injunction. Docket No. 24-25. Plaintiff will likely suffer
11 prejudice if default judgment is not entered as Plaintiff will effectively be without further option
12 of recourse against the Defendant for his unlawful actions.

13 **c. Possibility of Dispute**

14 The fifth *Eitel* factor requires the Court to consider the possibility of dispute as to any
15 material facts in the case. *Eitel*, 782 F.2d at 1471-1472. Upon entry of default, all well pleaded
16 facts alleged in the Complaint are taken as true except those related to damages. *See TeleVideo*
17 *Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987); Fed. R. Civ. P. 8(b)(6). Here,
18 the Plaintiff's Complaint pleads with sufficient specificity to support a plausible claim. The
19 Plaintiff's Complaint alleges all facts necessary to establish all of her claims and a Request for
20 Entry of Default. As Plaintiff's factual allegations are presumed to be true, no genuine dispute
21 exists as to any material facts.

22 **d. Possibility of Excusable Neglect**

23 The sixth *Eitel* factor requires the Court to consider the possibility that Defendant's
24 defaults resulted from excusable neglect. *Eitel*, 782 F.2d at 1471-1472. Due process requires that

1 interested parties be given notice of the pendency of an action and be afforded an opportunity to
2 be heard and present objections before final judgment. *Mullane v. Central Hanover Trust Co.*,
3 339 U.S. 304, 314 (1950).

4 Here, Plaintiff served Defendant in person according to the rules of the Federal Court of
5 California, in Philadelphia, Pennsylvania on November 2nd 2012 at 11:20 pm. Docket No. 10.
6 Defendant's answer was due on November 23, 2012. No answer was filed with the court. After
7 failure to appear, and continued failure to comply with this Court's Orders, Defendant was found
8 in contempt on January 9, 2013. Unlike *Eitel*, where the defendants failure to answer was
9 considered excusable neglect because there was a misunderstanding as to a belief that the final
10 settlement concluded the case, *Eitel*, 782 F.2d 1470, the Defendant in the present case has made
11 no effort to present his case before the Court. Defendant had every opportunity to respond, with
12 full knowledge of this lawsuit against him, and it was his responsibility to respond accordingly.
13 Moreover, not only did Defendant not respond, but also he responded to service of the Court's
14 Order by sending naked pictures of himself to Plaintiff's Counsel and posting the communication
15 on his website, thereby flouting his disregard for the law, this Court's proceedings, and cannot
16 claim he did not have an opportunity to respond. He simply chose to respond outside of this
17 forum in a completely inappropriate manner.

18 **e. Policy for Deciding on the Merits**

19 The seventh, and final, *Eitel* factor takes into account the preference of the Federal Rules
20 for deciding a case on the merits. *Eitel*, 782 F.2d at 1472. However, this preference by itself is
21 not dispositive and the Court allows for the termination of a case before the court can reach the
22 merits and allows for a default judgment. *See Fed. R. Civ. P. 55(a)*. Defendant in this case
23 willfully failed to provide this Court with an adequate response. Allowing the Defendant, who
24 egregiously failed to do such, to proceed to trial would greatly prejudice the Plaintiff. Judgment

1 against the defendant on all causes of action alleged in the Plaintiff's Complaint is proper at this
2 time.

3 **B. Plaintiff Has Met the Procedural Requirements for Entry of a Default Judgment**

4 Plaintiff has complied with Fed. R. Civ. P. 54(c) and 55(a). In the pending actions,
5 Plaintiff personally served the Defendant on or about November 2nd 2012 at 11:20 pm.
6 Defendant's answer was due on November 23, 2012. No answer was filed with the court. The
7 Court even continued the initial hearing to give Defendant additional time to obtain counsel and
8 make an appearance in this case. The Defendant is neither an infant, incompetent, in the military,
9 or otherwise exempted under and Federal or state provision. Plaintiff does not request relief that
10 differs from or exceeds that prayed for in the Plaintiff's Complaint.

11 **C. Plaintiff is Entitled to a Permanent Injunction**

12 Plaintiff has alleged in the Complaint, and has presented specific facts that Defendant has
13 unlawfully disseminated material knowing that it was not the Plaintiff. Compl. at ¶¶ 16, 17, and
14 24. Having found just Cause the Court has already entered a Preliminary Injunction against the
15 Defendant. Docket No. 24 and 25. Moreover, Defendant's failure to respond or otherwise appear
16 does not mean the Defendant will permanently cease from distributing the material or similar
17 material. Unless the Defendant is enjoined from the activity, the infringements may continue
18 with the irreparable harm and damage to Plaintiff's rights.

19 **D. Plaintiff is Entitled to Damages in the Amount of \$2,500,000 Based on Defendant's**
20 **Willful Infringement of Plaintiff's Trademark and Individual Rights.**

21 15 USC § 1117 provides for recovery of damages and costs when 15 USC §§ 1125 (a)
22 and (c) have been violated. The statute states in relevant part:

23 (a) Profits; damages and costs; attorney fees. When a violation of any right of the
24 registrant of a mark registered in the Patent and Trademark Office, a violation
under section 43(a) or (d) [15 USCS § 1125(a) or (d)], or a willful violation under
section 43(c) [15 USCS § 1125(c)], shall have been established in any civil action

1 arising under this Act, the plaintiff shall be entitled, subject to the provisions of
2 sections 29 and 32 [15 USCS §§ 1111, 1114], and subject to the principles of
3 equity, to recover (1) defendant's profits, (2) *any damages sustained by the*
4 *plaintiff*, and (3) the costs of the action.... In assessing damages the court may
5 enter judgment, according to the circumstances of the case, *for any sum above the*
6 *amount found as actual damages*, not exceeding three times such amount.... the
7 court may in its discretion enter judgment for such sum as the court shall find to
8 be just, according to the circumstances of the case.
9 15 USC 1117 (a) (emphasis added).

10 Here Defendant's actions were egregious, willful, intended to profit from dilution
11 of Plaintiff's image, and such actions were taken with reckless disregard for the falsity of
12 Defendant's claims. Defendant Moore violated 15 USCS § 1125(a) because he falsely
13 claimed the video originated with Passante and was created for him. Moore's statements
14 were intended to deceive the public into believing that Passante participated in,
15 condoned, and/or authorized the publication of the video and/or was in some way
16 affiliated with Moore, thereby driving web traffic and increased notoriety to Moore's
17 illicit website. The video disseminated by Moore not only contained images that
18 disparage Passante, but also contained a virus that was released when viewers attempted
19 to watch the video.

20 Defendant also violated 15 USCS § 1125(c) by posting pornographic images and
21 a pornographic video, attributing them to Passante. The pornographic nature of the
22 images and associated video tarnish Passante's reputation, celebrity and brand by their
23 very nature, as they allege she has taken part in immoral, lascivious acts. Moore's use of
24 Passante's name and likeness caused actual confusion as evidenced by the posts and
25 comments sent directly to Passante via social media. Moore's use of Passante's name and
26 likeness are commercial use as they are intended to misdirect traffic to his many websites
27 and lead to sales of his merchandise and music, which can be purchased through links on
28 the websites where the images appear. As a result of Moore's tarnishment to her image in

1 direct violation of 15 USC 1125 (c), Plaintiff is entitled to damages under 15 USC 1117
 2 (a).

3 As a direct and proximate result of Defendant's actions, Plaintiff's public image
 4 has been severely damaged and from a public relations standpoint the images cost more
 5 than just money. Consequently, Plaintiff seeks \$1,250,000 in actual damages and
 6 \$1,250,000 as exemplary damages.

7 **E. Plaintiff is Entitled to Statutory Damages Under Cal. Civ. Code § 3344**

8 California Civil Code codified and complimented the common law misappropriation of
 9 likeness cause of action. Section 3344 provides "in any action brought under this section, the
 10 person who violated the section shall be liable to the injured party or parties in an amount equal
 11 to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her
 12 as a result of the unauthorized use, and any profits from the unauthorized use that are attributable
 13 to the use and are not taken into account in computing the actual damages." To the extent that the
 14 Court does not find actual damages, the statutory damages are not preempted by the Lanham Act
 15 as statutory damages are not available under that Act. Defendant posted two infringing images
 16 on at least three different sites and the video on one known site. Consequently, Plaintiff seeks
 17 \$750 per violation for a total of \$5,250.

18 **F. Plaintiff is Entitled to Damages Under Defamation *per se***

19 When plaintiff can prove libel *per se*, damage to reputation is presumed, so that the plaintiff
 20 need not introduce evidence of actual damages to recover compensatory, or, in appropriate cases,
 21 punitive damages. *Barnes-Hind, Inc. v. Superior Court*, 181 Cal. App. 3d 377, 382, 226. When
 22 plaintiff can prove libel *per se*, damage to reputation is presumed, so that the plaintiff need not
 23 introduce evidence of actual damages to recover compensatory, or, in appropriate cases, punitive
 24 damages. *Barnes-Hind, Inc. v. Superior Court*, 181 Cal. App. 3d 377, 382, 226. Moore

1 intentionally posted the illicit still images and pornographic video stating as “fact” that they
2 featured Passante knowing that the statements were false, and that Passante was not in fact the
3 female appearing in the video and images. By publishing false and libelous statements associated
4 with the images and video, Defendant has defamed Plaintiff in direct violation of California law.
5 In the alternative to damages under the Federal Lanham Act, Plaintiff seeks \$1,250,000 as actual
6 damages for libel *per se* and compensatory damages in the amount of \$1,250,000.

7 **G. Plaintiff is Entitled to Reasonable Attorney’s Fees Under Federal and State Law**

8 Plaintiff is entitled to recover attorney’s fees pursuant to 15 USC § 1117, which states,
9 “The court in exceptional cases may award reasonable attorney fees to the prevailing party.”
10 Here, Defendant knowingly and with malice made false statements presented as fact, attributing
11 to Plaintiff lascivious acts and lewd conduct; antagonized her by posting on her social media
12 accounts and posting communications concerning this matter online. Further, Defendant willfully
13 refused to comply with a cease and desist letter, a temporary restraining order, a preliminary
14 injunction, and failed to address this matter at all, or remove the offending video and images
15 until faced with a contempt order and jail. Moreover, Plaintiff’s counsel attempted to settle this
16 matter out of court for over a month and Defendant failed to make any reasonable offer in light
17 of the nature of the offense and time and expense invested in having the offending materials
18 removed. Defendant was given ample opportunity to correct his wrong and to mitigate his
19 damages. He chose not to, and instead exacerbated and compounded his infringement by leaving
20 the video and images posted in violation of Court Orders and by continuing to post comments
21 about the video and Ms. Passante personally.

22 Additionally, Cal. Civ. Code § 3344 states in relevant part, “[t]he prevailing party in any
23 action under this section shall also be entitled to attorney’s fees and costs. As the prevailing party
24 in this action Plaintiff is entitled to recover attorney’s fees subject to an application submitted in

1 sufficient detail for the Court to make the usual lodestar analysis. *See Hanlon v. Chrysler Corp.*,
2 150 F.3d 1011, 1029 (9th Cir. 1998).

3 **H. Plaintiff is Entitled to Interest on the Judgment**

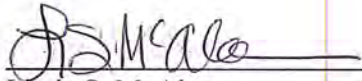
4 Plaintiff is entitled to post-judgment interest. "Interest shall be allowed on any money
5 judgment in a civil case recovered in a district court" 28 USC 1961(a). The post judgment
6 interest shall be calculated pursuant to the statutory rate. *Id.* Thus the Plaintiff is entitled to post-
7 judgment interest.

8 **III. CONCLUSION**

9 For the forgoing reasons, Plaintiff respectfully requests that she be awarded permanent
10 injunctive relief enjoining Defendant from further violation of her rights. In addition, Plaintiff
11 requests Judgment in her favor in the amount of \$1,250,000 in actual damages and \$1,250,000 in
12 exemplary or compensatory damages; \$5,250 statutory damages under Cal. Civ. Code § 3344,
13 and attorney's fees and costs subject to an application for fees, and post-judgment interest.

14
15 Respectfully Submitted,

16 Dated: May 7, 2013

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18 Linda S. McAleer
19 Attorney for Plaintiff
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